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SEAT BELT NEGLIGENCE: THE AMBIVALENT WISCONSIN RULES

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The mainstay of Wisconsin comparative negligence law is the principle that whether a victim may recover depends upon whether the victim's contributory negligence in causing his injuries is greater than the causal negligence of another party from whom recovery is sought. *Foley v. City of West Allis*[1] established an exception to this central principle. *Foley* held that a victim's contributory negligence in failing to use an available seat belt will not be considered in determining whether a tortfeasor is liable; it only will be considered in determining the extent of that tortfeasor's liability.

The peculiar nature of seat belt negligence[2] prompted this innovation. Seat belt negligence, unlike passive negligence,[3] is

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1. 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

2. Failure to wear seat belts is not negligence per se, but:

> where seat belts are available and there is evidence before the jury indicating [a] causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard. A jury in such case could conclude that an occupant of an automobile is negligent in failing to use seat belts.

Foley, 113 Wis. 2d at 483, 335 N.W.2d at 828 (quoting Bentzler v. Braun, 34 Wis. 2d 362, 387, 149 N.W.2d 626, 640 (1967)).

3. "Passive negligence" is defined in Wisconsin automobile negligence cases as conduct of a guest in failing to use ordinary care for his own safety in entering the car or in riding with the host when knowing of a hazard, whether the hazard be a condition of the car, the condition of the driver, his lack of skill, or any other hazard. Such negligence may contribute to or be a cause of the guest's injury or may not, depending upon the facts of the accident and the conduct of the host, but such negligence is not a cause of the collision or the accident. In such a case, the collision or accident may be termed the immediate cause or

not always causal of the victim's injuries in the usual sense that but for the failure to use due care, no injuries would have been suffered; rather, seat belt negligence may operate only to aggravate the extent of the victim's injuries.[4] In other words, seat belt negligence may not cause some of the victim's injuries but may cause other injuries.

Accident reconstruction experts can sometimes determine, with a greater or lesser degree of precision and certainty, which of a victim's injuries would have been prevented by the use of available seat belts and which would not. The *Foley* court held that those aggravated injuries caused by seat belt negligence are non-compensable.[5]

Foley, then, establishes twin holdings: seat belt negligence is not considered in determining whether a victim may recover from a tortfeasor; and injuries attributable to seat belt negligence are not compensable in a negligence action. In addition, the *Foley* court establishes a five step formula for implementing its twin holdings.

This article comments on both principal holdings in *Foley* and on the mechanism by which those holdings are to be implemented. In doing so, the Article suggests how the Wisconsin Supreme Court has muddled tort doctrine by virtue of the rules it fashioned for seat belt negligence cases.

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conduit through which the negligence of the host or other driver, or both, causes the injuries to the guest. If a cause of the accident is related to the hazard in respect to which the guest was negligent, such passive negligence of the guest is a contributing cause of his injuries.

Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis. 2d 91, 105, 118 N.W.2d 140, 147 (1962).

4. *Foley*, 113 Wis. 2d at 484-85, 335 N.W.2d at 828-829.

Seat belt negligence and passive negligence also differ in that passive negligence is not causal of the victim's injuries unless the victim negligently exposed himself to the very risk which produced the collision. An example would be the driver's sleepiness or the location at which the driver stops the car. *See supra* note 2. *See also* Britton v. Hoyt, 63 Wis. 2d. 688, 218 N.W.2d 274 (1974). Of course, these differences between passive negligence and seat belt negligence were not identified until *Foley*.

Scientific studies appear to confirm that the failure to wear a seat belt may aggravate a victim's injuries. *See generally* Hoenig & Shapiro, *Safety Belt Use: Some Product Liability Considerations*, J. PROD. LIAB. 153 (1984); Lester, *Seatbelts and the Defense of Contributory Negligence*, 57 LAW INST. J. 1058 (1983); Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272 (1980).

5. *See infra* notes 14-15 and accompanying text.

I. THE APPORTIONMENT PROBLEM

The Wisconsin Supreme Court has recognized as "the basic premise behind all tort law"[6] that a defendant's liability should be limited "to that portion of harm which he has in fact caused, as distinguished from harm arising from other sources."[7] The *Foley* court anticipates that seat belt negligence often results in additional harm separate from the harm that results from the initial collision between vehicles or between a vehicle and some other object. In seat belt negligence cases, the unrestrained body of the victim can be injured (or further injured) by coming in contact with objects that would not be struck if a seat belt had been used. If the trier of fact finds that a victim failed to use reasonable care for his own safety in not buckling his seat belt, evidence may show that this negligence caused some of the victim's injuries.

Not unreasonably, the *Foley* court used this proposition to view seat belt negligence cases as involving two seperate incidents. Evidence reconstructing the accident facilitates this bifurcation of the whole occurrence into two parts, each of which is susceptible to different treatment. The two parts of the typical seat belt negligence case are distinguished and identified based on which injuries are caused by seat belt negligence.[8] The first incident excludes, by definition, any injuries caused by the failure to wear a seat belt. Having so defined the first incident, it stands to reason that the negligent failure to wear a seat belt should have no bearing on whether a tortfeasor is liable for first incident injuries. The second inci-

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6. Sumnicht v. Toyota Motor Sales, 121 Wis. 2d 338, 350, 360 N.W.2d 2, 7 (1984).

7. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 433A (1965), which provides:

§ 433A. Apportionment of Harm to Causes

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

8. In *Foley*, the court describes seat belt negligence cases as involving two incidents, the actual collision and the resulting impact of the occupant of the vehicle against the vehicle's interior or some other object. Except in very rare circumstances, this second collision is the only incident in which seat belt negligence may play a role. 113 Wis. 2d at 485, 335 N.W.2d at 829.

dent includes, by definition, injuries that would not have occurred but for the failure to use an available seat belt.[9]

Problems of fairness and consistency plague the court's treatment of injuries caused by seat belt negligence. However, these problems do not infect the court's treatment of injuries not caused by seat belt negligence. Cases to which *Foley* applies will by definition involve victims, some of whose injuries are unrelated to seat belt use. A fundamental principle of negligence law provides that the proven absence of a causal link between an actor's conduct and injuries insulates the actor from liability for those injuries.[10] The seemingly innovative holding in *Foley* that seat belt negligence "should not be used to determine the injured party's contributory negligence for purposes of sec. 895.045 [of The Wisconsin Statutes],"[11] does no more than follow this fundamental principle.

The apportionment proposition adopted in *Foley* is sound, assuming that the discipline of accident reconstruction is up to the task of supplying the necessary evidentiary foundation for decision-making.[12] The *Foley* court's treatment of the first

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9. This distinction between the two incidents differs from the second collision analysis alluded to in *Foley*. *See supra* note 8. In some cases, second collisions may only produce injuries that would have occurred irrespective of the victim's failure to use a seat belt. In other cases, second collisions may produce some injuries that would have occurred irrespective of seat belt negligence and other injuries which seat belt negligence was a substantial factor in causing.

The holding in *Foley*, by insulating the tortfeasor from liability for injuries caused in part by the victim's seat belt negligence, divides the injuries on a basis different from initial collision *versus* second collision. It is misleading for the *Foley* court to describe the two parts of a seat belt negligence case as the first collision and second collision or as involving two incidents. Most likely, greater clarity could be achieved by describing the two parts of the case as the *seat belt injury* part and the *basic injury* part.

10. *See* RESTATEMENT (SECOND) OF TORTS § 430 (1965). *Cf.* Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 105 S. Ct. 107 (1984).

11. *Foley*, 113 Wis. 2d at 418, 335 N.W.2d at 826.

12. The recent Wisconsin Supreme Court decision in Sumnicht v. Toyota Motor Sales, 121 Wis. 2d 338, 360 N.W.2d 2 (1984), addressed Wisconsin's apportionment of damages rules. *Sumnicht* is an automobile negligence case complicated by a product liability "crashworthiness" issue. Finding that it is contrary to Wisconsin's strict product liability law to require a plaintiff to prove what injuries would have been caused had there been no defect in the automobile, the court held that in second collision cases the plaintiff only must prove causation of his injuries by defendant's conduct via the substantial factor test. This plurality holding could be interpreted in either of two ways. First, it could very well establish that damages may not be apportioned where there is no reasonable basis for doing so. This is consistent with well-established legal rules. *See e.g.*, RESTATEMENT (SECOND) OF TORTS § 433A (1965). Second, it may establish a new rule that damages may not be apportioned when to do so would necessitate a deter-

incident, (injuries not caused by seat belt negligence), seems altogether sound, indeed almost inescapable.[13]

II. *FOLEY'S* TREATMENT OF INJURIES CAUSED BY SEAT BELT NEGLIGENCE

The *Foley* court identifies as one of its goals reducing the victim's recovery "to the extent that wearing an available seat belt might have prevented injuries. . . ."[14] In other words, the *Foley* court seeks to treat the parties in such a way that "the defendant is not held liable for incremental injuries the plaintiff could and should have prevented by wearing an available seat belt."[15] The victim is to be denied recovery for injuries caused, even in part, by the victim's seat belt negligence.

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mination, on a hypothetical or speculative basis, as to what lesser harm would have been suffered but for the secondary negligence.

This second interpretation of *Sumnicht* could have substantial consequences for seat belt negligence rules in Wisconsin. Quoting Mitchell v. Volkswagenwerk, A.G., 669 F.2d 1199, 1204-05 (8th Cir. 1982), the *Sumnicht* court identified its concern:

> Liability and damage questions are difficult enough within orthodox principles of tort law without extending consideration to a case of a hypothetical victim. . . .
>
> . . .A rule of law which requires a plaintiff to prove what portion of indivisible harm was caused by each party and what might have happened in lieu of what did happen requires obvious speculation and proof of the impossible. This approach converts the common law rules governing principles of legal causation into a morass of confusion and uncertainty.

Sumnicht, 121 Wis. 2d at 355-56, 360 N.W.2d at 10.

Applying this concern to seat belt negligence cases, one would have to conclude that the *Foley* approach would rarely be applied. *Foley* calls for reducing recovery "to the extent that wearing an available seat belt might have prevented injuries." 113 Wis. 2d at 487, 335 N.W.2d at 829-30. In many seat belt negligence cases, this would mean determining what might have happened in lieu of what did happen, an exercise condemned in *Mitchell* and *Sumnicht* as involving "obvious speculation and proof of the impossible." *Mitchell*, 669 F.2d at 1204-05; *Sumnicht*, 121 Wis. 2d at 356, 360 N.W.2d at 10 (quoting *Mitchell*).

If *Sumnicht* applies in seat belt negligence cases, *Foley* is effectively emasculated and would apply only in the rare seat belt negligence case in which seat belt injuries are caused at a different time (perhaps only different by seconds) than all of the victim's basic injuries. *See infra* notes 49-58 and accompanying text.

13. *But see supra* note 12.

14. 113 Wis. 2d 475, 487, 335 N.W.2d 824, 830 (1983).

15. *Id.* at 489, 335 N.W.2d at 830-31.

A. Superseding Cause

One effect of the court's decision as to injuries caused by seat belt negligence is to treat seat belt negligence as if it were a superseding cause of those injuries.

Injuries caused by seat belt negligence are the result of concurring causes,[16] including any negligent conduct in causing the collision, any passive negligence on the victim's part and the seat belt negligence itself. In *Foley*, the court immunized tortfeasors from the full consequences of their negligence by placing sole responsibility for injuries caused by seat belt negligence on the victim.[17] This holding is substantially out of tune with modern Wisconsin case law concerning superceding cause.

In *McFee v. Harker*,[18] the Wisconsin Supreme Court adopted Restatement (Second) of Torts section 447 for determining whether the negligent conduct of a second actor supersedes the negligent conduct of a first actor, so as to make the second actor solely responsible for resulting harm. Section 447 provides:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing out, if
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.[19]

If seat belt negligence can be viewed as an intervening act, clauses (a) and (b) of section 447 would rule out treating the victim's seat belt negligence as a superseding cause.[20] Thus,

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16. "Concurring causes" are two or more causes which combine to produce a single result and each is a substantial factor in bringing about the result. RESTATEMENT (SECOND) OF TORTS § 433A comment i (1965).

17. *See supra* notes 13-14 and accompanying text.

18. 261 Wis. 213, 219, 52 N.W.2d 381, 384 (1952).

19. RESTATEMENT (SECOND) OF TORTS § 447 (1965).

20. Certainly, it is foreseeable that a fairly large number of users of streets and highways do not buckle their seat belts. Legislation mandating the use of seat belts

under the Restatement rule as adopted in *McFee* and affirmed in *U.S. Fidelity v. Frantl Industries*,[21] the victim's seat belt negligence would not constitute the sole, legally responsible cause of aggravated injuries caused by seat belt negligence.

Certainly, the active negligence giving rise to the collision in which the victim's seat belt negligence produces aggravated injuries continues as a substantial factor in producing those aggravated injuries. The successive tort rule of *Johnson v. Heintz*,[22] in which negligence producing a first collision continued to operate as a legal cause of a second collision a short time later, makes this abundantly clear.[23]

In any event, the rule expressed in *Foley* that aggravated injuries are attributable solely to seat belt negligence cannot be justified under superseding cause principles for an additional reason. The victim's seat belt negligence will not constitute an "intervening act of a third person" under Restatement (Second) of Torts section 447. A tortfeasor's active negligence in causing the collision will invariably occur after the victim's negligence in failing to use an available seat belt. If any act is

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could, conceivably, change this. *See* Towers, *The Significance of Plaintiff's Failure to Wear a Safety Belt Under Wisconsin Law*, 58 WIS. B. BULL. 13 (1985). For the time being and into the foreseeable future, however, reasonable motorists know that others might not use their seat belt or that such nonuse is not highly extraordinary.

21. 72 Wis. 2d 478, 490, 241 N.W.2d 421, 428 (1976).

22. 61 Wis. 2d 585, 213 N.W.2d 85 (1973); Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

23. It is inconceivable that a court would find that active negligence in causing a collision is not a substantial factor in bringing about seat belt injuries. *See* Johnson v. Heintz, 73 Wis. 2d 286, 302, 243 N.W.2d 815, 826 (1976), in which the court held: "The negligence of an actor in causing a collision can expose him to liability for the further damage proximately caused when additional impacts occur."

For some reason, though, the Wisconsin court ignores the "substantial factor" test in cases involving seat belt injuries. Austin v. Ford Motor Co., 86 Wis. 2d 628, 273 N.W.2d 233 (1979), affirms this unique treatment of seat belt injuries in a product liability setting involving a defective seat belt. In *Austin*, plaintiff's decedent, who was driving her car at an excessive speed, was killed in a one-car collision. The collision was caused by the driver's negligence in respect to speed and to management and control. Death resulted from the collision because of the defective condition of the seat belt that the driver was wearing. The court held that the driver's negligence in causing the one-car accident was not, *ipso facto*, a contributing legal cause of the driver's death in the collision. The apparent basis for this conclusion is that the driver may have been uninjured were it not for the defective seat belt. The defendant failed to offer evidence to prove that the plaintiff's negligent driving into a tree was a substantial factor in causing her injuries. It is difficult to understand how a collision is not a substantial factor in producing a death from impact in the collision.

intervening, it is the active negligence of the tortfeasor in causing the collision. Moreover, section 447 clearly limits superseding cause principles to acts by persons other than the victim.

B. Public Policy

If the *Foley* rule regarding injuries caused by seat belt negligence cannot be justified on superseding cause grounds, its justification must rest on public policy considerations.

Under Wisconsin negligence law, an actor may be relieved of liability for injuries caused by his negligent conduct if sound public policy considerations warrant such relief.[24] On this basis, a firefighter was denied recovery against a railway which negligently caused a fire[25] and a driver who was injured when he negligently extended his arm out of the window of his car was permitted to recover from a negligent defendant.[26] *Colla v. Mandella*[27] summarizes the circumstances in which public policy factors will justify relief notwithstanding an actor's causal negligence:

> It is recognized by this and other courts that even when the chain of causation is complete and direct, recovery against the negligent tort-feasor may sometimes be denied on grounds of public policy because the injury is too remote from the negligence or too "wholly out of proportion to the culpability of the negligent tortfeasor," or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way to fraudulent claims, or would "enter a field that has no sensible or just stopping point."[28]

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24. *See* A.E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214 N.W.2d 764 (1974); Osborne v. Montgomery, 203 Wis. 223, 232, 234 N.W. 372, 376 (1931). Of course, sound public policy considerations are applicable in superseding cause cases as well. For example in Merlino v. Mutual Serv. Cas. Ins. Co., 23 Wis. 2d 571, 581, 127 N.W.2d 741, 747 (1964), the court held that "in order for the intervening act of negligence to constitute a superseding cause, it must be such that the conscience of the court would be shocked if the first actor were not relieved from liability."

25. Haas v. Chicago & N.W. Ry. Co., 48 Wis. 2d 321, 179 N.W.2d 885 (1970).

26. Schilling v. Stockel, 26 Wis. 2d 525, 133 N.W.2d 335 (1965).

27. 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

28. *Id.* at 598-99, 85 N.W.2d at 348.

None of these factors justifies relieving a tortfeasor who causes a collision from liability for injuries caused concurrently by the tortfeasor's conduct and by the victim's seat belt negligence.

The *Foley* court believes that it is unfair to hold the tortfeasor liable for the victim's aggravated injuries, "injuries that the passengers with minimal effort could have prevented."[29] It almost appears that the court is impressed by the high culpability involved in seat belt negligence as compared with the tortfeasor's active negligence, at least in relation to the aggravated injuries.[30] The court seems to overlook the possibility that the active negligence of the tortfeasor may have consisted of drunk driving, very excessive speed, falling asleep at the steering wheel, or other highly culpable conduct. The *Foley* formula ignores variations in the nature of the active negligence: it categorically holds that injuries caused in part by seat belt negligence will be attributed solely to seat belt negligence, irrespective of the other causes which necessarily contributed to the result.[31]

This categorical treatment of seat belt negligence is antithetical to the purpose of comparative negligence. Unless one of the extraordinary circumstances identified in *Colla v. Mandella* is present,[32] persons at fault in causing an accident should be subject to an "equitable distribution of the loss in relation to the respective contribution of the faults causing it."[33]

Except as limited by Wisconsin Statute section 895.045,[34] comparative negligence rules seek to achieve the result that

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29. *Foley*, 113 Wis. 2d at 489, 335 N.W.2d at 831.

30. This implied emphasis on culpability seems present because of the court's focus on the *minimal effort* in seat belt use. Of course, it is also true that minimal effort is required to stay within the speed limit, keep a good lookout and come to a complete stop at a stop sign. These minimal efforts prevent collisions in the first place and avert *any* injury.

31. But for the collision, seat belt injuries would not occur. *See supra* note 23 and accompanying text.

32. *See supra* note 28 and accompanying text.

33. Bielski v. Schulze, 16 Wis. 2d 1, 17, 114 N.W.2d 105, 113 (1962).

34. WIS. STAT. § 895.045 provides:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed

losses are borne by parties in relation to those parties' causal negligence in bringing about the losses. This objective is achieved through special verdict questions,[35] through contribution actions, [36] and through rules governing releases and satisfaction.[37] *Foley* eschews this objective. Relief for seat belt injuries would be denied, under *Foley*, even though the seat belt negligence was very minor and the active negligence was very substantial. Consider a case in which a drunk defendant driving at twice the legal speed injures a plaintiff who failed to buckle his seat belt while moving his car from the street in front of his house into his garage. The jury could find the plaintiff negligent in failing to use his seat belt.[38] More significantly, if the plaintiff's injuries were substantially aggravated by the concurrence of seat belt negligence and the drunk driver's active negligence, the jury, in following *Foley*'s directive to place all blame for seat belt injuries on the victim,[39] could provide a grossly inadequate recovery to the plaintiff. Under the holding of *Foley*, the drunk driver's much greater fault would be of no consequence.[40] *Foley*'s treatment of injuries caused by seat belt negligence creates the very substantial risk of unjust and unwarranted results.

III. THE *FOLEY* FORMULA

In implementing its twin holdings, which were designed to shield tortfeasors from liability for injuries caused by seat belt negligence while not shielding them from liability for other injuries, the *Foley* court established a five-step process for calculating damages:

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shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

35. *See Foley*, 113 Wis. 2d at 491-93, 335 N.W.2d at 831-32 n.13.

36. *See* Pachowitz v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 383, 202 N.W.2d 268 (1972).

37. *See* Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

38. *See* Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

39. *See supra* notes 14-15 and accompanying text.

40. Although the weaknesses of *Foley*'s treatment of injuries caused by seat belt negligence most easily can be demonstrated by showing how fault principles are defeated, other objectives of tort law also are defeated by the *Foley* approach. In the drunk driver example, the tort objectives of deterrence, risk distribution and victim compensation are defeated as well.

> (1) Determine the causal negligence of each party as to the collision of the two cars; (2) apply comparative negligence principles to eliminate from liability a defendant whose negligence causing the collision is less than the contributory negligence of a plaintiff causing the collision; (3) using the trier of fact's calculation of the damages, reduce the amount of each plaintiff's damages from the liable defendant by their percentage of negligence attributedto the plaintiff for causing the collision; (4) determine whether the plaintiff's failure to use an available seat belt was negligence and a cause of injury, and if so what percentage of the total negligence causing the injury was due to the failure to wear the seat belt; (5) reduce the plaintiff's damages calculated in step (3) by the percentage of negligence attributed to the plaintiff under step (4) for failure to wear an available seat belt for causing the injury.[41]

The court however expressed some ambivalence about steps (4) and (5). Elsewhere in the opinion[42] and in a footnote,[43] the court suggested that, rather than accounting for injuries caused by seat belt negligence by having the jury apportion the percentage of causal negligence attributable to the victim's failure to wear a seat belt, the jury might apportion the *percentage of damages* attributable to the victim's failure to wear a seat belt. The court seems to regard these alternatives as functionally equivalent, apparently preferring the percentage of damages approach if and when appropriate jury instructions are drafted to implement this new type of special verdict apportionment question.[44]

Step (4) of the *Foley* formula calls for determining "what percentage of the total negligence causing the injury" was due to seat belt negligence. This determination appears on its face to involve the usual comparative negligence concerns. Ordinarily, when assigning percentages of causal negligence, the jury will determine how much each party is "to blame for the injuries," and percentages are to be assigned "to each party in proportion to the fault [that party] contributed" to cause the

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41. 113 Wis. 2d at 490, 335 N.W.2d at 831 (references to apportionment tables omitted).

42. *See supra* notes 14-15 and accompanying text.

43. 113 Wis. 2d at 495, 335 N.W.2d at 833, and *id.* at n.15.

44. *Id.*

injuries.[45] In making this determination, "[i]t is the conduct of the parties considered as a whole which should control."[46]

These rules directly conflict with the *Foley* court's intent to not hold the defendant liable "for incremental injuries the plaintiff could have and should have prevented by wearing an available seat belt."[47] As such, it is difficult to understand the court's seemingly mild invitation to the Wisconsin Civil Jury Instructions Committee to draft "an instruction which advises the jury that if it determines that the failure to wear a seat belt was a cause of the person's injuries, the jury must determine what *percentage of the total damages* for that person's personal injuries was caused by his or her failure to wear a seat belt."[48] Such an instruction would be consistent with the holding and rationale of *Foley* but would be a radical departure from step (4) of the *Foley* formula, at least in regard to the way that determinations of the percentage of causal negligence of each actor have previously been made in Wisconsin. Trial courts now have two options: first, to proceed under step (4) of the *Foley* formula as they would typically proceed in determining percentages of causal negligence; or second, to proceed as if step (4) truly contemplates determining what percentage of injuries (rather than fault) are attributable to seat belt negligence. The difference, which seems not to have been clearly recognized by the *Foley* court, is substantial.

In addition to the problem with the *Foley* formula related to step (4), a second unusual feature appears in the formula. Perhaps looking to the future use of a question requiring apportionment of damages, the *Foley* system of arithmetic differs from that usually applied in negligence cases involving more than one comparison of fault. The traditional method of arithmetic for determining the rights and liabilities of parties when the claimant is guilty of passive negligence is to "scale down" the parties' active negligence in causing the collision, so that when the percentages of all the parties (including the passively negligent claimant) are totalled, the sum is one hundred percent. Thus, for example, if a claimant was 20% at

45. *See* Wis. J. I. - Civil 1585, 1590 (1981).

46. Sailing v. Wallestad, 32 Wis. 2d 435, 439, 145 N.W.2d 725, 727 (1966) (quoting Maus v. Cook, 15 Wis. 2d 203, 207, 112 N.W.2d 589, 591 (1961)).

47. 113 Wis. 2d at 489, 335 N.W.2d at 831.

48. *Id.* at 495, 335 N.W.2d at 833 (emphasis added).

fault in causing the collision and the claimant was 25% responsible for his own injuries through passive negligence, the claimant would be 40% at fault for his own injuries (i.e., .20 $\times$ .75 = .15; .15 + .25 = .40). If the claimant's total damages are assessed at $10,000, he would recover $6,000.

The *Foley* formula takes a different path, though it reaches the same result. Step (3) in the formula calls for a calculation of "a plaintiff's provable damages by the usual rules of negligence without regard to the seat belt defense." [49] The results of the seat belt negligence apportionment question are then applied to the damages figure determined in step (3).

Assume a similar hypothetical to that presented above: A claimant is 20% at fault in causing the collision and 25% responsible for his injuries through seat belt negligence.[50] If the claimant's total damages are assessed at $10,000, under step (3) of the *Foley* formula, the claimant's damages would be recalculated as $8,000 (i.e., $10,000 $\times$ .80). The claimant's $8,000 in damages then would be reduced, under step (5), by 25% resulting in a $6,000 recoverable damage award. In other words, though the *Foley* formula for seat belt negligence differs from the traditional formula for passive negligence, in analogous sets of facts, identical results are achieved.

This being so, why does the *Foley* court prescribe an unfamiliar formula? Most likely the court's attraction to apportioning damages rather than comparing causal negligence provides the answer. The *Foley* court seems inclined to view basic injuries[51] as a first incident and seat belt injuries as a second incident. With this view in mind, the court then adopts a formula very analogous to the approach taken in successive torts cases. The court radically departs from the successive torts framework, however, by cutting off the liability of original tortfeasors for second incident injuries. This protection from liability is granted to the original tortfeasors even though their breach of a duty constitutes a substantial factor in producing the "second incident" injuries.

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49. 113 Wis.2d at 486, 335 N.W.2d at 829.

50. *See supra* notes 44-45 and text accompanying notes. The text points out that *Foley* is unclear as to what it would mean for a claimant to be 25% responsible for his injuries through seat belt negligence.

51. That is, injuries that were not caused by seat belt negligence.

IV. ALTERNATIVE PROPOSALS

The *Foley* rules for seat belt negligence suffer from three serious flaws: first, they represent bad, even archaic policy, by treating contributory negligence for failing to wear a seat belt as an absolute bar to recovery for injuries caused, in part, by the seat belt negligence; second, the holding and rationale of *Foley* appear to conflict with step (4) of the *Foley* formula; and third, the *Foley* formula prescribes unfamiliar arithmetic computations in a half-hearted effort to treat seat belt negligence like a successive tort. These flaws result from a decision that is innovative but that is too timid or too ambiguous to go the distance.[52]

A. The Successive Tort Approach

The injustice and oddity of the *Foley* formula could be cured by continuing on the bold path initiated by the court. Basic injuries and seat belt injuries could be treated as separate tort occurrences, similar to successive torts. Damages could be apportioned as between basic and seat belt injuries. In addition, fault could be apportioned as to each set of injuries. In apportioning fault for basic injuries, seat belt negligence would play no role, because it would not be causal. However, in apportioning fault for seat belt injuries, seat belt negligence would be compared with the active negligence of other parties. In this second apportionment and solely for the purposes of the seat belt injuries, seat belt negligence could be used to determine the injured party's contributory negligence for purposes of Wisconsin Statute section 895.045.[53] Although *some* victims who are guilty of seat belt negligence would be denied recovery for seat belt injuries under this approach, under the *Foley* formula *all* such victims are denied recovery. The attraction of the successive tort approach is its consistency with existing principles of negligence law and its fundamental fairness, at least to the extent that Wisconsin's comparative negligence rules are now fundamentally fair. The

52. Here, I only refer to the problems of apportioning damages and comparing fault for purposes of determining the *extent of recovery*. The *Foley* court makes a very successful bold move in its holding that seat belt negligence should not be used to determine the claimant's *right to recovery*.

53. *See supra* note 34.

successive tort approach in seat belt negligence cases is the logical conclusion of the process begun in *Foley*; it removes from the *Foley* formula the regressive rule that seat belt negligence is an absolute bar to recovery for the injuries as to which it is a concurrent cause.

Adopting a successive tort approach in seat belt negligence cases would add much consistency and clarity. One very troubling problem would remain, however, and that is whether seat belt negligence rules would then be consistent with product liability crashworthiness rules under *Sumnicht v. Toyota Motors Sales.*[54] Seat belt negligence cases and product liability crashworthiness cases are similar in that each typically involves active negligence by some party or parties in causing a collision, and additional fault by other parties in increasing the extent of harm actually suffered. In crashworthiness cases, this additional fault entails selling a vehicle that is defective and unreasonably dangerous as to the "overall protection [the] vehicle gives its passengers in a collision."[55] In seat belt negligence cases, however, the fault pertains to a passenger negligently failing to use an available seat belt. Under *Foley*, seat belt negligence cases turn on distinguishing between what injuries in fact resulted and what injuries would have resulted if seat belt negligence were not present. Under *Sumnicht*, the court may have disallowed distinctions in crashworthiness cases between what injuries in fact resulted and what injuries would have resulted if a crashworthiness defect were not present.[56]

Sumnicht may be distinguished from *Foley* in that strict product liability[57] involves substantially different public policy concerns than seat belt negligence.[58] Moreover, *Sumnicht*

54. 121 Wis. 2d 338, 360 N.W.2d 2 (1984).

55. *Id.* at 348, 360 N.W.2d at 6, n.4 (quoting Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy Cases,"* 16 WASHBURN L.J. 600, 607 (1977)).

56. *But see supra* note 12.

57. Liability under RESTATEMENT (SECOND) OF TORTS § 402A for harm caused by defective products is treated as negligence *per se* in Wisconsin. *See* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

58. *Sumnicht* and *Foley* may be distinguished based upon the nature of the duty breached, the deterrent intent and effect of the rules, and the economics involved. Product liability may be imposed upon a seller who is not, in the ordinary sense or the tort sense, at fault or blameworthy. Negligence presumes the opposite. In addition, product

and *Foley* are consistent in permitting the victim some recovery and in placing the burden of apportioning damages on the defendant.[59] It also should be noted that *Sumnicht* is a plurality opinion, with three members of the court joining in a concurring opinion[60] and one member of the court dissenting.[61]

Sumnicht, like *Foley*, raises issues that require clarification. The court's approach to apportionment of damages in cases not involving actual successive torts is clearly in a germinating stage. The court may choose to treat seat belt negligence cases and product liability crashworthiness cases differently, as *Sumnicht* and *Foley* suggest. In any event, an approach similar to that followed in actual successive torts cases would seem workable in seat belt negligence cases, assuming an adequate evidentiary basis for apportioning damages. If this approach, foreshadowed in *Foley*, is followed in seat belt negligence cases, the inconsistencies noted earlier could be resolved.[62]

B. The Modified Passive Negligence Approach

The *Foley* problems can be alleviated by tightening the reins as well as by loosening them: seat belt negligence could be made more like its progenitor, passive negligence, rather than by creating a new generation of quasi-successive torts. The seat belt negligence apportionment question could operate exactly as the current passive negligence apportionment question, except that the *Foley* rule that seat belt negligence is

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liability rules, especially as to retailers of pre-packaged products not susceptible to inspections, sometimes have no deterent value, unlike seat belt negligence rules. Finally, seat belt negligence works to make the victim shoulder the burden of his own injury unlike product liability which is a risk-spreading device.

59. *Sumnicht*, 121 Wis. 2d at 355-57, 360 N.W.2d at 10; Foley v. City of West Allis, 113 Wis. 2d at 489, 335 N.W.2d at 830-31. As a form of contributory negligence, the defendant would have the burden of pleading and proving that the claimant was guilty of seat belt negligence and that such negligence caused harm.

60. Chief Justice Heffernan authored the concurring opinion in which Justices Abrahamson and Bablitch joined, stating that from the wording of the special verdict at trial, "it is clear that the jury concluded that all of [the] damages sustained were caused by the [product defect]." *Sumnicht*, 121 Wis. 2d at 379-80, 360 N.W.2d at 21. As such, the plurality's treatment of apportionment of damages is dicta.

61. Justice Steinmetz, in dissent, agreed with the concurring justices that the plurality's treatment of the law of enhanced injuries was unneccessary to the decision. *Sumnicht*, 121 Wis. 2d at 384-86, 360 N.W.2d at 23-24.

62. *See supra* notes 14-50 and accompanying text.

not used for purposes of section 895.045 could be retained.[63] To do so, the court would have to abandon its apportionment of damages idea and its view that seat belt negligence is the sole responsible cause for injuries that would not have occurred but for the failure to use a seat belt. To abandon the apportionment of damages idea is to abandon the successive tort analogy; to abandon the sole responsible cause view is to return to the late twentieth century from the early twentieth century.

A modified passive negligence approach would require a collision apportionment question. In addition, after determining the existence of causal seat belt negligence, the jury could be instructed to answer a seat belt negligence apportionment question, recognizing that some injuries are caused by the victim's seat belt negligence *as well as* by the active negligence of other parties, and that other injuries are caused *only by* the active negligence of other parties. Although such an apportionment question, even coupled with brilliant instructions, may not yield scientifically "nice" responses, it asks little more of the jury than the usual multi-claimant case in which passive negligence is at issue.

The occassional monstrous case may come along, in which not only a collision apportionment question and a seat belt negligence apportionment question must be asked, but also a traditional passive negligence apportionment question. It should be noted that this identical problem would arise under the *Foley* formula with the same set of facts. In addition, as every torts teacher knows, it is possible for students and for fate to create fact patterns that strain the rules of comparative negligence to the limit. In such cases, the logic of the rules holds up fairly well, even though the patience of judge and jury may not.

The greatest shortcoming of the *Foley* case is that it needlessly defies rules of comparative negligence, and by doing so jeopardizes a system that can produce generally consistent and reasonably fair results. The pre-*Foley* rules can be used to accomplish *Foley*'s desirable objectives.

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63. The *Foley* formula already may inadvertently accomplish this result. *See supra* notes 42-48 and accompanying text.

V. CONCLUSION

Foley reflects a court that is grappling with the enormous problems of apportioning damages in cases not involving actual successive torts. Difficulty is inherent in this problem because frequently evidence is not available to implement logical and apparently just rules. The complexities of seat belt negligence cases cannot be removed by a single decision. *Foley* made progress. More work remains to be done.